IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER CO., a Wisconsin corporation, *Appellees*.

On Appeal From the Supreme Court of Wisconsin

SUPPLEMENTAL MEMORANDUM OF APPELLEE KOHLER CO. IN SUPPORT OF MOTION TO DISMISS APPEAL

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This supplemental memorandum is filed by Kohler Co., in response to certain arguments advanced by AFL-CIO in its brief amicus curiae in support of appellant's statement as to jurisdiction and in opposition to the motions to dismiss previously filed by appellees Wisconsin Board and Kohler Co.

Essentially, the entire statement of AFL-CIO seeks to establish a single proposition; i.e., that, while Sec.

8(b)(1) of the amended National Labor Relations Act leaves to the states the power to control violent and coercive union conduct by criminal prosecution or other similar means, it denies to them the power to control precisely the same conduct in the enforcement of the states' own labor policies. This general proposition underlies the AFL-CIO treatment of *Allen-Bradley Local 1111* v. *Wisconsin Board*, 315 U.S. 740, *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, the scope of the state's police powers, and the legislative history of Sec. 8(b)(1). Thus, the *amicus* brief is no more than a more extensive statement of the "remedial preemption" theory advanced by the appellant in its jurisdictional statement. As such, the *amicus* brief would not require separate response from the appellee.

AFL-CIO, however, has placed special emphasis on one aspect of the case which was not relied upon by appellant as a separate ground to support jurisdiction in this Court. At pages 10 to 14 of its brief, AFL-CIO takes the position that there is an actual and significant conflict between state and federal remedies in this case. To support this proposition, AFL-CIO makes extensive reference to the record currently being made in a proceeding before a Trial Examiner of the National Labor Relations Board in which this appellee is the respondent. *Matter of Kohler Co.*, NLRB Case No. 13-CA-1780. The record in that proceeding shows, AFL-CIO says (Brief at p. 10), that, "In this case the same strike has given rise to two unfair labor practice proceedings—one under the federal act and one under the Wisconsin act—in which the same issues are being litigated." Not only that, says AFL-CIO, but, "The very conduct here involved is also currently the

subject of a National Labor Relations Board proceeding." (Id. at p. 10).

There are two short answers to this contention advanced by amicus.

First, it is not accurate to say that the same issues are being litigated before the National Labor Relations Board as were litigated before the Wisconsin Board. As we have pointed out in our Motion to Dismiss, a substantial part of the decree ultimately issued by the state courts pertains to matters over which the National Labor Relations Board has no regulatory authority. Moreover, even with respect to those aspects of the controversy which may be subject to state and federal regulation, the issues before the federal Board are different from those presented to the state Board. The proceeding before the federal Board arises entirely out of charges filed against the Kohler Co. There is no way in which that proceeding can result in the allowance of affirmative relief to the Kohler Co., such as was obtained from the state Board. In addition, we wish to advise the Court that the issue of mass picketing and similar coercive tactics has been largely eliminated from consideration in the NLRB proceedings by stipulation between Kohler Co., and counsel for the Board's General Counsel. In effect, that stipulation recognizes that the Company acted within its rights in refusing to bargain with the Union during the period in which the mass picketing was being conducted.

The second and, we believe, conclusive answer to the AFL-CIO's suggestion of actual state-federal conflict in this case is the fact that none of the proceedings before the National Labor Relations Board is of record in this case.

We did not object to the incidental reference made by appellant (footnote 2 at p. 8 of appellant's Jurisdictional Statement) to the proceeding before the NLRB. We believe, however, that an entirely different question is presented by the attempt of the AFL-CIO to persuade this Court to note probable jurisdiction on the basis of factual allegations without any support in the record. This is tantamount, we submit, to requesting this Court to decide a case which is not before it for decision.

CONCLUSION

To the extent that the argument advanced by AFL-CIO under the heading "The Federal-State Conflict in This Case" (Brief at pp. 10-14) rests on factual statements with respect to the pending proceedings before the NLRB, that argument is without foundation in the record on this appeal and should, therefore, be disregarded by the Court.

Respectfully submitted,

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